THE MAKARRATA

SOME WAYS FORWARD

National Aboriginal Conference Position Paper
delivered to

The World Council of Indigenous Peoples
Canberra, 1981.

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This paper is a report on the current status of the Makarrata and the further plans of the National Aboriginal Conference (NAC) with respect to it. It will deal essentially with conceptual issues involved in negotiating the Makarrata, although some comment will be made upon its content and the process by which it could be negotiated.

CONCEPTUAL MATTERS

In Australia at the moment it appears that the two proposed parties or signatories to a Makarrata – the Australian Government and the NAC – have different concepts of what it means and involves. On the one hand we, the Aboriginal people, plainly think of it as a treaty with the Aboriginal Nation. This became clear during a recent tour of Australia by the Makarrata Committee when it visited many communities to hear Aboriginal views on the issue.[1] On the other hand, it seems that the Australian Government, as advised by the Federal Attorney-General,[2] sees the Makarrata simply as a normal contract with a special group of Australians.

The significance of the Government's position is that it hopes to have Aborigines accept from the outset of the negotiation of the Makarrata that they are part of the Australian nation as a whole, and thus by implication to waive the effect of the Aboriginal concept of nationhood and its consequent effect upon the form the Makarrata should take. However, we as Aborigines maintain that our nationhood is a matter both of fact and of law. We have already referred to the views of Aborigines whom we have canvassed on the issue, and we intend during the course of this paper to discuss the legal implications of the matter. We consider that such a conceptual formulation of the issue is necessary because of its impact on the form, effect and content of the Makarrata.

INTERNATIONAL ENTITY

First, some background on international and legal developments is necessary. The period since World War II has seen the self-determination of the Third World of formerly colonised countries. This has led to the development of the law of self-determination to a point where the concept is now established in international law. The law of self-determination occurred because it was asserted as a fact. Such law was established in the face of a concept of international law as a regime which only governed relations between established nation states. It has been one of the first moves towards the re-establishment of some principles of equity and justice in international law,[3] after several centuries of the limitation of international law to justifications of international aggression and exploitation by Western nations of the people of the rest of the world.

The emergence of such a law of self-determination has provided a basis upon which not only the Third World, but also the Fourth World of internally colonised indigenous minorities may base a case for the liberation. It is clear that international law will continue to develop with a view to recognising and assisting the claims of these previously unrecognised national entities and organisations. Thus it is only upon the basis that Aborigines have an ongoing right to be recognised as an international entity that they can come to the negotiating table.

1. The Trip Report is in the **Makarrata Report** by J. P. Hagan, (Eleventh Executive Meeting, Canberra).
2. See the NAC 'Report of the Makarrata Workshop', 8-12 December 1980.
3. For one discussion of the international perspective see G. L. J. Coles, 'The International Significance of an Aboriginal Treaty', ANU seminar paper, 17 July 1980.

The Aboriginal people therefore require that the Australian Government recognise their international standing. The 'convenient falsehoods'[4] surrounding the legal interpretation of how Australia was settled, as described recently by a jurist of the High Court of Australia, are not necessarily established law. Thus there is no impediment to the Australian Government recognising the Aboriginal Nation as an international entity with which it may treat. Equally, it is still arguable that there is no impediment to the Australian courts recognising in due course that, in accordance with principles espoused by the International Court of Justice in the Western Sahara Case,[5] sovereignty has always resided in the Aboriginal people.

This would permit the negation of the idea that Australia was settled by Europeans on the basis that it was unoccupied land or what lawyers call **terra nullius.**[6] The national courts of Australia need only be bound by restrictive justifications such as the law of prescription (by which title to land is acquired simply by the passing of time) if they so choose.[7]

Furthermore, as has been indicated, even in international law it is not necessarily considered that such a principle will prevent the recognition of national minorities in due course. The impact on Australia's constitutional law of a declaration by the Government or a court that Aborigines may treat as an Aboriginal Nation, will be to allow the enactment of the proposed Makarrata as a law having effect throughout Australia by virtue of the Australian Government's paramount power over matters concerning external affairs.[8] No doubt such a result would not be without challenge in the national courts, but as it is one important effect of the nationhood which we assert, it must be followed up and cannot be jeopardised at this stage by compromising our international status. Before leaving this matter, we emphasise that recognition of our international status is not dependent upon these kinds of legalisms but, nevertheless, it is obvious that it would facilitate their use. It is only the Aboriginal people who have so far suffered only the brunt rather than the benefit of legal fictions.

CONSTITUTIONAL AMENDMENT

Providing our nationhood was recognised, we would be prepared to consider the implementation of a Makarrata on the strength of constitutional power which had been obtained by referendum.[9] Once again, this was one of the suggestions Aborigines put forward at the meetings recently conducted around Australia by the Makarrata Committee. The constitutional issue arises because the first goal of the Makarrata is the attainment of land rights and at the moment the main obstacles to the Makarrata are the Australian States. The only effective way therefore of achieving our objective is to obtain constitutional authority to the effect that matters agreed in the Makarrata may be implemented by the Australian Government, that land handed over in any settlement is not the subject of 'just compensation' to the States concerned, and that only the surface value, not the value of the minerals beneath, is to be assessed. After all, they got it for free!

Accordingly, we suggest that an alternative form of implementation of the Makarrata would be an agreement in which either as a condition precedent to the negotiation or execution of the agreement, or as a binding term of it, the Australian Government seek and obtain constitutional authority as outlined above and as is otherwise necessary. We believe that given the way in which the Makarrata has captured the imagination of Australians and is continuing to generate their support, such constitutional authority will be granted as it was in the 1967 referendum on Aboriginal matters.

Thus, if we were to move to a position where we negotiated as an international entity but relied on a constitutional amendment to enforce the settlement, even though we would not be

4. Judgement of J. Murphy in Coe v Commonwealth of Australia, 1979, 53 ALJR 403.
5. Advisory Opinion on Western Sahara, I.C.J. Reports 1975.
6. For further discussion:
   B. Keon Cohen, 'The Makarrata – A Treaty Within Australia Between Australians – Some Legal Issues', Current Affairs Bulletin, Vol. 57, No. 9, p.4.
   H. C. Coombs, 'The Proposal for a Treaty Between the Commonwealth and Aboriginal Australians'. CRES working paper, HCC/14, 1979, ANU Canberra.
7. See West Rand Central Gold Mining Co. Ltd. v. The King, 1905, 2 K.B. 391, p.407.
8. The extent of this power is discussed in R.D. Lumb and K.W. Ryan, The Constitution of Australia, Butterworths, 1974, p.145.
9. This was suggested by the Aboriginal people of Kalgoorlie at an NAC sponsored meeting reported on in the Trip Report, see 1 above.

negotiating exactly as a foreign nation, we would still wish to assert our international identity as a people within Australia (although, of course, such an entity is not geographically defined within Australia). It must be realised that we cannot commence negotiating a treaty designed to improve our situation when by that very act we surrender the distinct character which is the very reason why the negotiations are necessary. In this sense the Federal Attorney-General's advice to the Australian Government (referred to earlier), to the effect that our sovereignty should not be recognised, is a regressive assimilationist view. As the first Australians, our existence as an international entity can be asserted without falling foul of separatist divisions within modern Australia. Those divisions already exist. We seek to rectify them by discrimination in favour of us rather than against us. The saying 'one law for the lion and the lion is oppression' should be remembered.

Accordingly, if negotiations are to commence, we at least require recognition as a domestic nation in a manner similar to the legal recognition accorded to American Indians over a century ago.[10] Alternatively, if we are to negotiate without obtaining such recognition, then we may have to expressly reserve in the Makarrata the issue of our international status. We cannot surrender such status either expressly or by implication because we have a responsibility to future generations who may wish to assert this nationhood in national or international forums. For instance, if any Makarrata to be negotiated was later found insufficient by Aborigines, or was dishonoured by the Australian Government, then any agreement which waived our assertion of nationhood would itself be a further impediment to international redress. No doubt this is the reason the Denē Nation of North America, in the discussions being held on a treaty between them and the Canadian Government, refuse to compromise their national sovereignty.[11] Although both of the processes of negotiation outlined above are open to the possibility of rebuff by either the judiciary or by a referendum, we consider these options must at least be attempted, as they offer the most fruitful prospects in what is otherwise a legal and constitutional mudhole. We know there are many other options that could be utilised if the current avenues are closed off. Amongst others, we feel that the Australian Government, if it is serious in its declared intent to assist us, should at least take a bold initiative and attempt to ascertain (by a test case if necessary), the extent of the Government's constitutional power to make special laws with respect to any race of people.

NAC STANDING

Prior to any negotiations the Australian Government should also legislate to give the NAC corporate standing and statutory functions so as to enable it to negotiate on behalf of Aborigines throughout Australia. The heavy responsibility of seeking directions from Aboriginal people on the form and content of the Makarrata should be recognised in the legislation by providing it with a secure source of funds which is not subject to political limitation. Equally, safeguards should be provided in the law by granting rights to rank and file Aborigines, to allow them to take action to control their organisations if it appears that particular persons or organisations are being subjected to the sort of political pressure which has already been seen in the case of other Aboriginal organisations negotiating with the Government.

If the Prime Minister is not prepared to make these first substantive moves, then his good faith must be queried and we wonder whether his offer to entertain a treaty is only a ploy to defuse the Aboriginal issue, promote his own international standing with the Black nations of the world and further the status of the NAC as an organisation set up by his own government.

THE NAME MAKARRATA

It is in this context that the name Makarrata and the meaning given to it is significant. Obviously the Attorney-General does not want the word 'treaty' used because of its international connotations. It is precisely for this reason that Aborigines must consider the issue carefully. The use of the word 'treaty' would assist to a small degree with the assertion of national status, although it is true that whatever name is used can be given the meaning which the parties to the

10. See Cherokee Nation v. State of Georgia, 1831, Pet. 1, p.17 per C. J. Marshall.

11. See D. Barwick, 'Making a Treaty: The North American Experience', paper prepared for the Aboriginal Treaty Committee, 1980, p.11.

agreement decide it should have. It is therefore suggested that if the word Makarrata is to be used (and we note that Aborigines appear to have equal preference for the word 'treaty') then the problem could be overcome by defining it as a treaty between the two parties in whatever capacity they agree should be accorded to each of them.

PROCESS

All that has been said so far has been mainly concerned with the conceptual issues surrounding a Makarrata. Obviously, despite this discussion, these issues will have to be debated and all options canvassed by Aborigines before any formal proposals can be put to the Government. Even then, the negotiating strategy followed and the issues that are put forward will vary depending on the colour of the Government of the day. In addition to the matter of the form of the agreement as so far discussed, other important issues to be considered are the process of reaching agreement and, of course, its content.

The proposed content of the Makarrata has already been adequately outlined in the report of the Makarrata Committee and it is not proposed to deal further with the matter in this paper, except to say that the pamphlet referred to should be liberally interpreted. However, with respect to process, one procedure has been suggested which merits consideration.[12] This procedure could, we believe, be built into the NAC legislation which we earlier suggested was necessary to allow negotiations to take place. The suggested procedure is as follows:

Step 1: The NAC commission from the best persons available 'position papers' setting out the options which need to be considered before negotiations begin. These could cover:
- the form of the agreement;
- land rights;
- compensation;
- protection of Aboriginal identity, law, religion and culture;
- guarantees of non-discrimination;
- Aboriginal self-management, especially in relation to education, law and order, health services and social service benefits;
- Aboriginal political, administrative and financial organisations;
- procedures for enforcement of the provisions of the agreement (e.g. international arbitration).

Step 2: The NAC commission simple summaries of the best papers for circulation in print and on tapes among Aboriginal organisations and communities.

Step 3: The NAC calls a Convention of representatives chosen by recognised Aboriginal organisations, communities and traditional groups to discuss the position papers.

Step 4: The Convention representatives should return to their organisations to report to their constituents.

Step 5: The NAC recalls the Convention to consider a first draft of the Makarrata or Treaty for submission to the Government.

Step 6: The Convention then stays in existence so that it can be recalled as necessary before and during negotiations to consider issues as they arise (possibly by resort to the same steps as above) and finally to approve or reject the agreement provisionally made by the negotiators.

CONCLUSION

Finally, before leaving the matter of the process to be used, it is important to observe that the consultation, research and negotiations would take place over a period of several years. There must be no quick solutions or political pressure to achieve a solution which could be presented as an achievement by any Government. Although it is inevitable that individual reputations will become associated with the concept of a treaty and its negotiation, we wish to avoid the conciliatory trap involved in seeing the achievement of conducting negotiations as an end in itself. The negotiations will only be a means to Aboriginal ends.

12. Letter dated 22 September 1980 from Dr H. C. Coombs to the NAC Chairman, Mr J. P. Hagan.